87-688

CASE NO. A-231

IN THE
SUPREME COURT OF THE UNITED STATES

DREW GALLOWAY, SHERIFF
Holmes County, Florida,

Petitioner,

vs.

JIMMY JOSEY

Respondent.

ANSWER TO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHERE A PETITIONER IN AN ASYLUM STATE HABEAS CORPUS PROCEEDING FILED TO CONTEST EXTRADITION PRESENTS EVIDENCE THAT HE IS NOT A FUGITIVE, IS THE EXTRADITION WARRANT AND ANNEXED DOCUMENTATION, WITHOUT MORE, SUFFICIENT TO CREATE CONFLICTING OR CONTRADICTORY EVIDENCE REQUIRING REMAND?

WHETHER HEARSAY AFFIDAVITS, UNSWORN STATEMENTS OF ABSENT WITNESSES, AND EX PARTE AFFIDAVITS ARE ADMISSIBLE IN STATE HABEAS CORPUS PROCEEDINGS FILED TO CONTEST INTERSTATE EXTRADITION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

PREFACE

The Petitioner, Dean Galloway, as Sheriff of Holmes County, Florida, ex. rel the State of Florida, was the appellee in the District Court of Appeal First District of Florida, and was the Petitioner in the Supreme Court of Florida. The Respondent, Jimmy Josey, was the Appellant in the District Court of Appeal, First District of Florida, and was the Respondent in the Supreme Court of Florida. In this pleading, the parties will be referred to as they appear before this Court.

OPINIONS BELOW

The opinion of the Supreme Court of Florida was rendered on April 16, 1987. This decision is reported at 507 So.2 590, and is reproduced in Respondent's Appendix at A-1.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the Supreme Court of Florida was rendered on April 16, 1987. The Petitioner's timely motion for rehearing was denied by the Supreme Court of Florida on June 25, 1987. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. Sec. 1257(3) and Rule 17(1)(b) and (c), Rules of the Supreme Court of the United States. This is a civil case.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

Article IV, Section 2, Clause 2, of the United States Constitution, provides as follows:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

Title 18 U.S.C. Sec. 3182 implements the above provision, and provides as follows:

> Wherever the executive authority of any state or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produced a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, testified as authentic by the governor or chief magistrate of the State or Territory to which such a person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive to be delivered to such agent when he shall appear.

Florida's adoption of the Uniform Criminal Extradition Act (Section 941.01 - 941.29, Fla. Stat. 1941) includes Section 941.02 which specifically provides:

> Sec. 941.02 FUGITIVES FROM JUSTICE:- DUTY OF GOVERNOR
>
> Subject to the provisions of this chapter, the provisions of the Constitution of the United States controlling, and any and all Acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any persons charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case as set forth in his Petition for Writ of Certiorari.

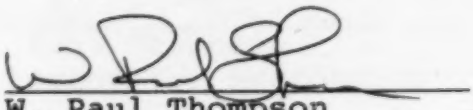
REASONS FOR DENYING THE WRIT

Counsel for Respondent has researched the cases cited in Petitioner's brief, and found not one single case which states that the documents on which a Warrant in Extradition is based and the Warrant itself constitutes a conclusive case against which there is no defense. Granted, occasionally the rules of evidence seemed strained as in Smith v. State of Idaho, 373 F.2d 149 (9th Cir. 1967), in which the court received six Affidavits and a Deposition. Nothing in that case indicates that using Affidavits was questioned. If the State's position in nthis matter is upheld, it means simply that there is no defense to extradition, other than patent irregularity or insufficiency of the documentation. The issue of whether or not the accused is a fugitive is no longer a defense to extradition in the State of Florida.

CONCLUSION

The decisions of the Florida Supreme Court and the First District Court of Appeal of the State of Florida should be upheld, and the trial court's order denying Habeas Corpus was properly reversed.

Respectfully submitted,



W. Paul Thompson
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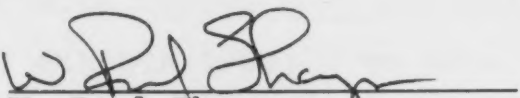
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Counsel for Petitioner, Andrea Smith Hillyer, Assistant General Counsel, The Capitol, Tallahassee, Florida 32301, this 15th day of March, 1988.



W. Paul Thompson
Attorney for Respondent

SUPREME COURT OF FLORIDA

No. 67,747

DREW GALLOWAY, as sheriff
of Holmes County, Petitioner

vs.

JIMMY JOSEY, Respondent.

[April 16, 1987]

BARKETT, J.

We have for review Josey v. Galloway, 482 So.2d 376 (Fla. 1st DCA 1985), certified as in conflict with Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983). We have jurisdiction. Art. V, S3(b)(4), Fla. Const.

We are asked to determine the burden of proof a respondent must bear to overcome an existing presumption that he is a fugitive from justice and therefore subject to extradition. We conclude that when a warrant is based upon a facially valid probable cause hearing in the foreign state, the accused may only defeat extradition as to this issue by producing clear and convincing proof that he is not a fugitive from justice.

On January 31, 1984, an Alabama grand jury returned the indictment in this case charging that:

> Jimmy D. Josey, whose name is to the Grand Jury otherwise unknown, did knowingly obtain or exert unauthorized control over ten tons of nitrogen fertilizer, the property of Don Johnson, of the value of, to wit: $1500, with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.

482 So.2d at 380 (footnote omitted). Based on these charges Alabama authorities issued a writ of arrest.

The District Attorney for the Twentieth Judicial Circuit of Alabama then filed a sworn application asking the governor of Alabama to seek Josey's extradition. In pertinent part, this petition alleged that Josey had been charged with second-degree theft, had been present in Alabama at the time of the crime, and currently was a fugitive from justice in Florida. The governor of Alabama issued a demand for extradition to the governor of Florida, attaching copies of the indictment and the writ of arrest. Honoring this request, the governor of Florida issued a warrant.

After his arrest in Florida, Josey filed a petition for writ of habeas corpus. He challenged the allegation that he was a fugitive from justice and agrued that he was present in Florida the entire day of the alleged theft.

At the hearing on Josey's petition, the state introduced the Alabama indictment and writ of arrest, the Alabama district attorney's application, and the Florida warrant, and rested its case. Josey responded to the charges by calling seven witnesses, including himself and his wife, who testified that he was not in Alabama the day of the theft. The evidence reflected that Josey had been a sales representative for Golden Plant Food Company, a fertilizer manufacturer in Henry County, Alabama. On his own behalf, Josey testified that he had not been in or near Headland, Alabama, site of the theft, since attending a meeting with Golden Plant Food representatives sometime between March and May 1983.

An eyewitness to the theft testified that it occured on October 16, 1983. At that time, individuals purporting to be Golden Food Company employees loaded fertilizer belonging to Don Johnson and drove away. This eyewitness said that he knew Josey and that Josey "was not one of the individuals ther with the truck loading the fertilizer." Four witnesses testified that they saw Josey in Bonifay, Florida, during various times of the day on October 16, 1983. Both Josey and his wife testified that he was in Bonifay the entire day.

After argument, the trial court denied Josey's petition for habeas corpus, finding that "there was no legal reason that would bar Alabama authorities from returning Jimmy Josey to that state to answer criminal charges named in the governor's rendition warrant." Josey obtained review in the First District Court of Appeal, which remanded for legally sufficient findings of fact:

> Since the trial court did not find that appellant failed to meet his burden of proof, but stated simply that " no legal reason" existed for denying his return to Alabama, it appears the court may have denied the writ as a matter of law.

482 So.2d at 382-83.

The First District below noted conflict with Brunelle based on the latter's assertion that extradition is mandatory when the accused's evidence "does no more than create a conflict" with the state's evidence. 433 So.2d at 20. Interpreting this language to mean that any evidentiary conflict requires extradition, the First District rejected the reasoning of Brunelle and found that an accused must be afforded some meaningful opportunity to defeat the presumption that he is a fugitive.

We agree with the First District's reasoning, but decline to read Brunelle so narrowly. To do so would render meaningless the guarantee of a habeas corpus hearing and the accompanying right to present evidence against the warrant under Florida's Uniform Interstate Extradition Act, sections 941.01-941.42, Florida Statutes (1985),

as well as under the decisions of the United States Supreme Court. See Michigan v. Doran, 439 U.S. 282, 288-89 (1978).

In Doran, the Court held that interstate extradition is a summmary and mandatory executive proceeding and ruled that a facially valid extradition warrant issued by the governor may not be challenged solely on the basis of a purported lack of probable cause. 439 U.S. at 290. However, Doran recognized four permissible challenges:

> (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Doran, 439 U.S. at 289. Only the last of these factors is pertinent to the case at bar, and the focus of our inquiry is directed to the manner by which such a challenge can be sustained.

The principles governing this issue were enunciated by the United States Supreme Court in Illinois ex rel. McNichols v. Pease, 207 U.S. 100, 109 (1907).

> One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.

In McNichols, the accused contended he was in a different state on the day of the crime, but could only account for his presence there during a few hours of the afternoon. The warrant did not limit the time of the crime to the afternoon hours, and the crime occurred approximately one to one and one-half hours from the place the defendant purported to be. Based on these scant facts, the McNichols court found that the accused had not defeated the presumption that he was a fugitive from justice.

In South Carolina v. Bailey, 289 U.S. 412 (1933), the Supreme Court again spoke on the issue, using the language later adopted by the Fourth District in Brunelle. The Court in mid-thought stated:

> ". . . [T]he court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

289 U.S. at 421 (quoting Munsey v. Clough, 196 U.S. 364, 374 (1905). In the same pen stroke, the Court echoed the language of McNichols and reaffirmed the right of a defendant to challenge the presuption that he is a fugitive from justice:

> "When a person is held in custody from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States."

289 U.S. at 421 (emphasis added). The Bailey court then applied this principle to its case:

> [W]e may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of homicide.

289 U.S. at 421-22 (emphasis added).

The Court then rephrased the principle:

> Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice.

289 U.S. at 422 (emphasis added). Despite the use of somewhat inconsistent language, the Bailey court plainly held that the presumption arising from the governor's warrant can be defeated by clear and convincing evidence that the accused was not in the jurisdiction where and when the crime occurred. See also Walton v. State, 98 Idaho 442, 566 P.2d 765 (1977). As the Second District correctly observed in State v. Cox, 306 So.2d 156, 159 (Fla. 2d DCA 1974):

> The question of whether an accused is a fugitive from justice asks nothing more than whether he was bodily present in the demanding state at the time of the offense and there-after departed from that state.

Partly because of the language in Bailey, the Florida courts have shown considerable confusion in their approach to this issue.

Under facts similar to those of the present case, the Third District in State v. Davila, 481 So.2d 486, 492 (Fla. 3d DCA 1986) (on rehearing), held that a petitioner cannot defeat the governor's warrant if the evidence "does no more than create a conflict . . . on the question of his whereabouts (during the crime)." Earlier, that same court in State v. Scoratow, 456 So.2d 922, 923 (Fla. 3d DCA 1984), had held that the burden is on the accused to "'overthrow conclusively the presumption against him'" (quoting State ex rel. Kimbro v. Starr, 65 So.2d 67, 68 (Fla. 1953)); but the Scoratow court went on to say that "merely contradictory evidence on the issue of the accused's presence in or absence from the demanding state" will not defeat the warrant. 456 So.2d at 923. Our own holding in Kimbro may have added to the confusion by noting that a court's "plain duty" is to deny habeas corpus releif where the evidnce "is in direct conflict." 65 So. 2d at 69. Based on our reading of Bailey and the Florida Uniform Interstate Extradition Act, we find that

conflict of evidence is not the appropriate standard for testing a petitioner's challenge. The sole question is whether the petitioner has defeated the presumption of validity with clear and convincing proof he was not in the demanding jurisdiction when the crime occurred.

We next turn to a related evidentiary issue addressed by the court below. Based on its reading of pertinent caselaw, the First District concluded that the state cannot meet its burden of proof merely by submitting affidavits not based on first-hand knowledge. 482 So.2d at 385. This holding, while essentially correct, requires clarification. We agree with the First District that affidavits not based on first-hand knowledge carry little evidentiary value, either in the state's or the petitioner's case. However, other than to prove that the petitioner is the same person named in the original charges, the quality of the state's proof becomes an issue only if the petitioner comes foward with clear and convincing evidence that he is not a fugitive. The burden then shifts to the state

to produce competent evidence discrediting the petitioner's proof tosuch a degree that it ceases to be clear and convincing. While the court may receive any evidence it deems proper, affidavits and other heresay not based on first-hand knowledge, without more, are insufficient to meet the state's burden on this issue. We hasten to note, however, that the evidentiary value of any extradition paper has no effect on the presumption that the petitioner is a fugitive, which arises immediately upon issuance of a valid warrant.

Adhering to these core principles, the First District remanded the present action to the trial judge to weigh its evidence under the appropriate legal standard. We concur and cite with approval a pertinent analysis by the Supreme Court of Idaho:

> If a petitioner presents no evidence, the presumption operates to mandate the extradition. If a petitioner does present evidence, the trial court must decide whether the petitioner has established by clear and convincing evidence that he was absent from the demanding state at the time of the offense.

> The state, at its option, may present evidence or not. If [the state] chooses to submit additional affidavits, the court must view all evidence presented and determine whether, on balance, the petitioner has carried his burden. . . . If, on the other hand, no evidence is presented by the state, and the court is faced with uncontroverted evidence from the defendant, it must evaluate that evidence alone to determine whether the petitioner has carried his burden by clear and convincing proof.

Walton v. State, 98 Idaho 442, 445, 566 p.2d 765, 768 (1977). Our sister court further explained that:

> uncontroverted evidencr from the petitioner does not automatically mean that the petitioner has met this burden, for the court might disbelieve the credibility of the witnesses. If the trial court views all the evidence and determines that the presumption was not overturned, then it is not necessary for the state to go foward with evidence.

Id. at 445, 566 P.2d at 768.

We find that the Idaho court's analysis correctly states the law pertaining to this issue. The presumption and procedure outlined above are founded, on one hand, in our obligation under the constitution and its supremacy clause to ensure the integrity of the extradition process. Florida may not provide sanctuary to those fleeing justice in her sister states, thereby turning this

nation's criminal justice system into a game whose outcome rests largely on whether the accused can cross a border. See Doran, 439 U.S. at 287. On the other hand, the constitution forbids a state from exercising its extradition powers based on false] accusations, simple ignorance of the law or wanton abuse of process. Every state has an equal obligation to see that no such attempt is successful and, simultaneously, that any corrective measures it takes will preserve the constitutional policy underlying extradition. Id. at 288.

Accordingly, we approve the district court's opinion and its action in remanding the matter to the trial court for further proceedings consistent herewith.

It is so ordered.

OVERTON and SHAW, JJ., and ADKINS, J. (Ret), Concur. McDONALD, C.J. and EHRLICH, J., Dissent
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

First District - Case No. AZ-233

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for Petitionerr

W. Paul Thompson, DeFuniak Springs, Florida

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